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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Ex Parte Presentation in MM Docket No. 95-176

Dear Mr. Caton:

Pursuant to Section 1.1206(b) of the Commissions Rules, this is to disclose that on July 9, on behalf of A&E Television Networks and Ovation, the undersigned met with Anita Wallgren, Legal Advisor to Commissioner Susan Ness, Marsha McBride, Legal Advisor to Commissioner James Quello, and Gretchen Rubin, Legal Advisor to Chairman Reed Hundt to discuss the issues raised in the above-captioned proceeding. The discussion focused on comments previously filed in this proceeding. The attached summary, copies of which were provided to the staff members listed above, provides an outline of the discussions.

As required in Section 1.1206(b) of the rules, two copies of the ex parte submission are enclosed. Please contact the undersigned if you have any questions with regard to this matter.

Respectfully submitted,

Robert Corn-Revere

Robert Corn-Revere

Enclosures

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cc: Anita Wallgren
Marsha McBride
Gretchen Rubin

A&E/Ovation Talking Points

- **The Commission historically has implemented policies with due regard for the effect on programming services.**

⇒ Cable rate regulation was modified with "going forward" rules after the Commission understood that strict enforcement of its rules was hampering new programming. The Commission revised its rules "[b]ecause appropriate incentives for adding new channels serves the statutory goal of "promot[ing] the availability to the public of a diversity of views and information."

⇒ As part of the "going forward" rules, the Commission created "new product tiers" in order to "provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose."

⇒ The FCC entered into social contracts with a number of cable operators, most of which allow the creation of "migrated product tiers." The FCC created NPTs and MPTs "to expand the programming choices available for subscribers."

⇒ Social contracts were found to further statutory objectives by avoiding rigid regulatory mandates. The Commission's goals to "simplify" regulation and "afford adequate protection for subscribers [and others]" were served by a flexible approach, rather than by strict application of the rules.

⇒ In implementing leased access rules, the Commission rejected the initially-proposed cost/market-based formula in favor of a plan based on the average implicit fee. In doing so, the Commission cited its desire to promote the "growth and continued development of cable systems" and its intention to avoid "requiring the operator to bump existing programming."

- **Closed captioning provisions of the Telecommunications Act preserve this balanced approach toward programming services.**

  ⇒ The Conference Report recognized "that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors." It noted that "the Committee does not intend that the requirement for captioning should result in . . . previously produced programming not being aired due to the cost of the captions." The Report directed the Commission to "balance the need for closed captioned programming against the potential for hindering the production and distribution of programming."

  ⇒ While Sections 713(b) and (c) empower the Commission to establish rules for captioning to be included in video programming, and to implement an "appropriate schedule" for compliance, subsections (d) and (e) establish a series of exemptions.

  ⇒ Section 713(d)(1) calls upon the Commission "by regulation" to exempt from any captioning schedule "programs, classes of programs, or services" for which "closed captioning would be economically burdensome to the provider or owner of such programming."

  ⇒ The committee reports identified several factors to be used in establishing exemptions, including but not limited to: (1) the nature and cost of captioning; (2) the impact on operations of the program provider, distributor or owner; (3) the financial resources of the program provider, distributor or owner; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; (7) the existence of alternative means of providing access to the hearing-impaired, such as signing.

  ⇒ Section 713(e) requires the Commission to allow exemptions in particular cases, where compliance would cause an undue burden. Congress defined this term as "significant difficulty or expense" and set forth the following factors to be considered: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.

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- **The Commission must consider the economic realities affecting programming networks in establishing an "appropriate schedule" for compliance and in setting other closed captioning rules.**

  ⇒ The NPRM noted that virtually all nationally broadcast programming, both commercial and noncommercial, contains closed captioning, including prime time programming, children's programs, news, daytime programming and some sports programming.

  ⇒ Progress in providing closed captioning did not happen overnight. The Commission first indicated a need to devote more attention to this issue twenty-seven years ago, and much existing captioning became available as a result of government support. 40 percent of the cost of closed captioning was underwritten by Department of Education Grants.

  ⇒ The NPRM documented the high cost of closed captioning. The annual cost for a local television station to caption three weekly hours of live programming was estimated to range between $131,000 at the extreme low end, and over $1.3 million as an upper estimate.

  ⇒ The cost of captioning requirements for cable programmers such as A&E and Ovation will be much higher, both because more programming will be subject to the mandate and because live programming costs far less to caption. The Commission's estimate that the cost of captioning falls in a range between $800 and $2,500 per hour is accurate, although programmers' experience has been that actual costs are closer to the higher end of the scale. Rates for live captioning are about half this cost, ranging from $900 to $1,200 per hour. But A&E airs few live programs -- and The History Channel has never aired any. Ovation also airs little live programming.

- **The Commission must consider the ecomonic impact of captioning timetables in relative terms, in the context of the particular programming market at issue.**

  ⇒ The economics driving the cable industry differ significantly from those of broadcast network television. The ratings achieved by cable networks such as A&E -- which averaged a 1.26 prime-time rating in 1996 -- are on an entirely different scale from broadcast networks. Cable networks cannot support the same overhead costs as an established broadcast network, which has a standard average rating of around 12. This difference is crucial, since a single ratings point may be worth $100 million in advertising revenue to a broadcast network over the course of a season.

⇒ The cost per prime time hour for a broadcast network is approximately $1 million. This means that the four established over-the-air networks spend approximately $64 million on prime time programming each week.

⇒ In the 1994-95 television season, broadcast network programming cost per rating point were as follows: ABC ($49,410); CBS ($53,500); NBC ($48,682); and Fox ($68,740). The average program cost per ratings point for the networks was $54,377 -- a 13.9 percent increase over the previous year.

⇒ The four broadcast networks, spend more on prime time programming <u>in two weeks</u> than does a cable network the size of A&E, The History Channel or Ovation in the course of a year. Such costs are covered by much greater revenues, because of the differences in ratings and advertising rates.

- **The ecomonic impact of captioning requirements is particularly acute for emerging networks.**

  ⇒ Even successful new networks that benefit from good name recognition and other advantages take almost five years to break even after launch.

  ⇒ Start-up costs of launching a stand-alone cable network have been estimated at $100 million.